

**Committee on Energy Environment and Climate**

**House of Representatives of Belgium**

**Palais de la Nation**

**B-1008 Brussels (Belgium)**

**Dear Members of the Committee,**

I would like to express my gratitude for inviting me for the Committee's hearing on the Motion for Resolution on the Withdrawal of the European Union from the Energy Charter Treaty (DOC 55 2593/001), which I gladly accept. I believe it is crucial to engage stakeholders from civil society, academia, industry, and government agencies, as well as the Energy Charter Secretariat (Secretariat) with our depth of "first-hand" knowledge of the Energy Charter Process, in consultations on such important matter. With present-day challenges in the energy sector, climate crisis and the need to accelerate the "clean" energy transition, and the ongoing reform of the international investment regime, the issue of the withdrawal from the Energy Charter Treaty (ECT) may not be taken lightly.

Having been asked my opinion on the Motion, I would like to briefly address the resolution part of the Motion and bring to your attention the following.

**In relation to point A<sup>1</sup>**

1. **Proposal suggests that the ECT is perceived by investors as an "insurance policy" and an additional "source of profit".** However,
  - Insurance for political risks (provided by the World Bank's Multilateral Investment Guarantee Agency (MIGA), other international and national institutions, or private companies):
    - **Requires legal security and protection of investments in a host country**, usually ensured through international investment agreements (e.g. one of the prerequisites under Germany's foreign investment protection scheme is sufficient legal protection in a host country to be ensured through investment protection treaties; also, Article 12 of MIGA Convention).
    - **Covers less political risks than international investment agreements** (e.g. MIGA guarantees do not cover breaches of fair and equitable treatment).
    - **Is time-limited** (e.g. MIGA insures investments usually up to 15 years while energy investments, with high upfront costs, have a longer life cycle).
    - **May not cover specific countries due to high risks.**
    - **Covers a limited economic value:** insured investors are responsible for a percentage of the loss and the insurance company has a payment limit (e.g. MIGA has a limit of USD 720 million per country on a net basis and USD 220 million per project on a net basis).
    - **Limited to new investments**, in case of governmental insurance providers.

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<sup>1</sup> "considering the problematic elements associated with the Energy Charter Treaty and its international investor-State arbitration clause [...]".

- **Does not exclude investor-state dispute settlement (ISDS)**, since insurance providers who compensate investors may start arbitration against the host state (e.g. Article 18 and Article 57 of MIGA Convention).
- The ECT does not provide an additional source of profit for investors. It applies the international law standard of full reparation as far as damages are established. Furthermore, the “modernised” ECT clarifies that monetary damages would be limited to the loss suffered by an investor and may not include punitive damages.
2. **Proposal suggests that investors claim significant amounts of damages, which often exceed the amounts invested.** However, it is not the amounts claimed that are the relevant factor but the amounts actually awarded (which are much lower).
  3. **Proposal suggests that the respondent states found in breach of the ECT are liable for significant amount of damages.** However,
    - The total amount of monetary compensation (excluding tax gross-up and interest) awarded to the claimants from the European Union (EU) in disputes with non-EU Contracting Parties is approx. **EUR 39 billion**.
    - The total amount of monetary compensation (excluding tax gross-up and interest) awarded to claimants in disputes with EU Member States is approx. **EUR 1.8 billion**. There is no information that a single euro has been paid to the claimants yet. On the contrary, EU Member States have resisted and challenged paying the awards, sometimes together with the European Commission, arguing that it may constitute illegal state aid under EU law or that it is the result of unlawful “intra-EU” arbitration (even though the “disconnecting” clause prohibiting intra-EU arbitration would only appeared in the modernised ECT).
    - The proposal points out that ISDS cases are usually initiated against states with relatively high levels of democracy and rule of law. Nevertheless, the 2022 Rule of Law report of the European Commission raises concerns about some EU countries, which may result in the lack of confidence for non-EU investors.
  4. **Proposal suggests that the ECT offers investors additional protection for their investments in fossil fuels against states’ regulatory actions.** However,
    - Arbitral tribunals under the current ECT have confirmed that Contracting Parties may take regulatory actions to respond to changing circumstances in the public interest as far as they are not inconsistent, discriminatory, retroactive and arbitrary.
    - The ECT protects investments in renewable energy, which is instrumental for clean energy transition. Among the ISDS cases instituted against EU Member States and the EU, **76%** of the cases concern renewables.
    - The amounts of emissions generated by ECT-protected investments and the fiscal impact of the protection offered by the ECT mentioned in the Motion are not based on an objective and verifiable methodology.

- The ECT has only generated four ISDS cases involving EU Member States that could be considered as related to energy transition, climate action or environmental protection. Two of these cases are suspended with one likely to be discontinued.
- The modernised ECT reinforces the right of the Contracting Parties to regulate within their territories in line with the EU's new investment policy (as confirmed by the European Commission) with
  - o a new stand-alone article on the right to regulate in the interest of legitimate public policy objectives (including climate change mitigation and adaptation) and an express clarification that such non-discriminatory regulation would not be considered as indirect expropriation;
  - o a number of provisions on sustainable development, reaffirming the respective rights and obligations of the Contracting Parties under multilateral environmental and labour agreements and recognising the urgent need to effectively combat the climate change;
  - o promoting adherence to international standards and principles of responsible business conduct.
- The modernised text sets a cut-off date for the protection of fossil fuels in the EU, which falls within the EU's objective of becoming climate neutral by 2050 (while still providing protection for investments in clean energy), and is based on the deadlines contained in the proposal submitted by the EU in February 2021. **Other EU's international investment agreements, including Comprehensive Economic and Trade Agreement (CETA), protect fossil fuels, and EU Member States have around 1,500 bilateral investment treaties (BITs) that protect fossil fuels and include ISDS.** The European Parliament has already stressed the inconsistency of blocking the adoption of the modernised ECT while keeping the above agreements that protect fossil fuels. Withdrawing from the ECT and those agreements instead of reviewing them would be detrimental for acceleration of investment in clean energy transition (how would the much needed investments in renewables be protected?).

#### **In relation to point B<sup>2</sup>**

- The modernised ECT clarifies that Article 26 (ISDS) would not apply intra-EU. On the contrary, if the modernised ECT is not adopted, there will not be any disconnecting clause (expressly recognising the the ECT does not apply to intra-EU cases).
- On 14 March 2022, the Council of the EU allowed Member States to adopt the amendments to the International Centre for Settlement of Investment Disputes (ICSID) ISDS Rules instead of requesting withdrawal from the ICSID Convention. While the EU is not a member of the ICSID, it has also incorporated by reference the ICSID ISDS Rules into its trade and investment agreements.
- Around 1,500 BITs of EU Member States still contain ISDS. However, the modernised ECT includes new provisions on transparency, dismissal of frivolous claims and payment of security for costs.

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<sup>2</sup> "considering the complexity of the negotiations relating to the modernisation of the Energy Charter Treaty and the fact that its Article 26 was not open to discussion within the framework of these negotiations".

### **In relation to point C<sup>3</sup>**

- The suggested *inter se* agreement based on the Vienna Convention on the Law of Treaties (VCLT) “clarifying that the ECT and its sunset clause do not, and never did, apply in an intra-EU context” may not lead to expected legal effects since:
  - It could be considered as a “reservation” not allowed under Article 46 of the ECT or a “protocol” for complementing or supplementing the provisions of the ECT, which would require approval by the Energy Charter Conference.
  - It could only be entered into by Contracting Parties. Therefore, it would not apply to Italy and any other EU Member States that withdraw before the entry into force of such *inter se* agreement.
  - Article 16 of the ECT, which disappears in the modernised text and has been frequently used by arbitral tribunals when rejecting EU Member States’ intra-EU objections, would not allow such *inter se* agreement to apply since it would be less favourable to investors.
  - Neither the EU nor other Contracting Parties to the ECT (such as Afghanistan, France, Iceland, Jordan, Romania, Türkiye and Yemen) are parties to the VCLT.

### **In relation to point D<sup>4</sup>**

- Contrary to the proposal, it is unlikely that the proposed “neutralisation” of the “sunset” clause under Article 47 of the ECT would take place. Therefore, should the EU and/or Belgium decide to withdraw from the ECT prior to the adoption of the modernised text,
  - The current provisions of the ECT will continue to apply to existing investments, including those in fossil fuels, for 20 more years from the date such withdrawal takes place. On the contrary, the provisional application of the modernised ECT would phase out such protection much earlier. Also, under provisional application of the modernised ECT all new provisions would apply in the meantime (such as the right to regulate for climate change mitigation and adaptation and carve-out of intra-EU arbitration).
  - New investments in fossil fuels made until sometime in 2024 or later (one year after the notification of withdrawal) will obtain protection for the following 20 years pursuant to the provisions of the current ECT. Only the adoption of the modernisation would limit protected investments in fossil fuels to those made until 15 August 2023 (regardless of the date of withdrawal).
- In addition, the EU’s withdrawal from the ECT would affect:
  - Association Agreement with Ukraine, which incorporates Article 7 of the ECT (Transit).
  - Current application, through the ECT, of WTO rules to non-WTO Members such as Azerbaijan (the EU-Azerbaijan Partnership and Cooperation Agreement expressly refers to the ECT) and Turkmenistan, in case of trade disputes.

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<sup>3</sup> “considering the existence of a legal basis for withdrawal from the Energy Charter Treaty through an *inter se* neutralisation of its survival clause”.

<sup>4</sup> “considering the benefits presented by, on the one hand, the neutralisation of the survival clause within the European Union and, on the other hand, the withdrawal from the Energy Charter Treaty of the Member States of the European Union”.

- Current application of provisions on energy transit (which include the obligation not to stop energy transit in case of a dispute) with non-EU Members who are Contracting Parties to the ECT.
- International energy cooperation between OECD and non-OECD countries.
- Belgium as a seat of the inter-governmental organisation (Headquarters Agreement) established by the ECT.

#### **In relation to point E<sup>5</sup>**

- Contrary to the proposal, the “**Flexibility Mechanism**” in the modernised ECT implements the principle of **Common But Differentiated Responsibilities** contained in the Paris Agreement by allowing the Contracting Parties to pursue net zero goals taking into consideration their developmental goals. The modernised ECT also requires to review the scope of protected investments under the Treaty every five years to update it to the evolving needs of Contracting Parties and society as well as to technological developments. The modernised ECT is a first-of-its-kind multilateral effort to implement the Paris Agreement in international investment and trade context.
- A number of provisions in the modernised text reaffirm the Contracting Parties’ respective rights and obligations under the Paris Agreement and other environmental agreements.
- The alignment of the modernised text with the Paris Agreement was confirmed by the European Commission.<sup>6</sup>
- On the contrary, blocking the modernisation of the ECT would prevent other Contracting Parties from better aligning their obligations under the ECT with the Paris Agreement.

#### **In relation to point F<sup>7</sup>**

- Contrary to the proposal, Regulation 2021/1119, similarly to the Paris Agreement which it seeks to implement, does not call for immediate phase-out of fossil fuels or investment protection for fossil fuel-related investments. Instead, it envisages phase-out of subsidies for fossil fuels.
- Regulation 2021/1119 also stresses the need to consider, among others
  - “adequate instruments, incentives, support and investments to ensure a cost-efficient, just, as well as socially balanced and fair transition, taking into account different national circumstances in terms of starting points”;
  - “solutions that are based on carbon capture and storage (CCS) and carbon capture and use (CCU) technologies”;
  - reduction of energy poverty;
  - “investment certainty”.

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<sup>5</sup> “having regard to the United Nations’ Paris Climate Agreement of 12 December 2015”.

<sup>6</sup> See at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=COM:2022:521:FIN>.

<sup>7</sup> “having regard to Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (‘European Climate Law’)”.

- Therefore, the modernised ECT with its novel **Flexibility Mechanism**, in fact, implements EU Climate Law as much as it implements the Paris Agreement.

For the above reasons, the potential withdrawal from the ECT should be distinguished from adoption of the modernised text. As already stressed by the European Commission, it is in the best interest of the EU and its Member States not to object to the adoption of the modernisation before any potential withdrawal. Otherwise, the EU and its Member States would be deliberately (i) not approving the disconnecting clause; (ii) preventing other Contracting Parties from better aligning their obligations under the ECT with the Paris Agreement; and (iii) extending investment protection under the ECT to new investments in fossil fuels in the EU (including those that will be made between 15 August 2023 and the effective day of withdrawal). Furthermore, non-objection to the adoption of the modernised text would not require the EU or its Member States to ratify the modernised ECT.

I hope that the above clarifications can assist you in your legislative process. The Secretariat's Staff and I stand ready to provide you with any further information you may need.

Yours sincerely,

Guy Lentz

Secretary-General, Energy Charter Secretariat